OCBC BANK (MALAYSIA) BHD

v.

BELTON SPRINGS INDUSTRIES SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB SAID J
[SUIT NO: D8-22-1429-2002]
16 AUGUST 2005

CIVIL PROCEDURE: *Summary judgment - Appeal against - Default in repayment of credit facilities - Plaintiff's demand for debts owing - Whether there were triable issues raised by defendant to merit a trial - Whether a proper case to grant summary judgment*

CONTRACT: *Interest - Compound interest - Whether plaintiff entitled to charge compound interest and vary margin of interest for the facilities - Estoppel - Non query of accounts - Whether created an estoppel against first defendant - Whether first defendant raised 'manifest error' to certificate of indebtedness over calculation of interest*

CONTRACT: *Breach - Terms of facilities - Whether plaintiff entitled to recall facilities - First defendant's failure to comply with explicit terms of conditions - Whether first defendant entitled to 18 months deferment of installment*

CONTRACT: *Guarantee - Corporate guarantee - Clause provides guarantor would not be released or exonerated - Whether second defendant bound and reliable*

The plaintiff herein granted credit facilities to the first defendant by letters of offer dated 13 March 1997 and 30 September 1996. By a corporate guarantee dated 11 April 1997, the second defendant guaranteed the facilities for an aggregate amount of RM4,300,000 inclusive of interest, commission and accrued charges. The plaintiff varied the prescribed rate for term loan above the Kuala Lumpur interbank offer rate for three months fund, overdraft and bankers acceptance over and above the bank's base lending rate (BLR) from time to time. The defendant defaulted in the repayment of the said term loan facility and were in arrears of RM263,468.98 as at 14 March 2001. Through a notice dated 19 March 2001, the plaintiff demanded the first defendant to pay up the arrears which it failed to do. By letter dated 21 August 2002, the plaintiff recalled the said credit facilities and declared the indebtedness outstanding in respect thereof to be forthwith due and payable. In the same notice, the plaintiff made a demand requiring the first defendant to pay the debt then owing for

all the facilities in the sum of RM3,939,318.04 as at 31 May 2002 and interest accruing thereon. The plaintiff also made a demand against the second defendant as guarantor under the corporate guarantee for payment of the debt then owing by the first defendant. The plaintiff was granted summary judgment by the senior assistant registrar. Hence, this appeal by the defendants before this court. The issues that arose were: (1) whether the plaintiff was entitled to vary the margin of interest for the facilities and charge compound interest; (2) whether failure of defendant to dispute the amount due before filing of this suit amounts to an estoppel and the effect of the certificate of indebtedness; (3) whether plaintiff had breached its promise to grant the deferment of 18 months installments; (4) whether plaintiff entitled to review and recall facilities; (5) whether plaintiff entitled to rely on admission of debt; (6) liability of second defendant under guarantee and (7) whether there were triable issues to merit a trial of this action.

Held (dismissing the appeals with costs):

[1] Clause 2(b) of the letter of offer gave the plaintiff the contractual right to vary not only the margin but also the BLR facilities. The terms and conditions set out there are contractual and binding on the parties. However, even though the plaintiff has the discretion to vary the rates, that discretion must be subject to reasonableness of the increase based on commercial banking practice, a term which must necessarily be implied into the contract. The defendant's contention that cl. 2(b) was void for uncertainty under s. 30 of the Contracts Act 1950 was therefore without force. (p 364 c-d)

[2] Clause (e) of the letter of offer allowed the plaintiff to charge 1% above the applicable interest rate or such other rates as may be determined by them on overdue amount. As long as any sum was due and not paid including interest by the specified date, interest at the prescribed overdue rate was payable and this included interest upon interest. The plaintiff was therefore entitled to charge this interest upon interest or compound interest. (p 365 e)

[3] At all material times, the first defendant did not make any complaint over the statement of accounts and the letter of demand. The non query of the accounts created an estoppel against the first defendant. The court was also satisfied that the first defendant had not successfully raised 'manifest error' to the certificate of indebtedness over calculation of interest. (pp 365 g-h & 366 h)

[4] The defendants had contended that the plaintiff had agreed to grant an 18 months deferment of installments for term loan effective. The plaintiff averred that condition 2 ('settlement of current two months arrears') and condition 5 ('… terms and conditions are acceptable, kindly confirm by signing and returning the duplicate of this letter by 31 October 1998 after which date this offer is deemed to have lapsed') had not been complied with. The letter was signed by the defendant on 2 September 1999 while the payment of arrears was made on 27 January 1999. The plaintiff had chosen not to accept and there was no need to notify the defendant that it was rejected because the offer had lapsed by then. It was the first defendant that had not complied with the explicit terms of the said conditions and therefore not entitled to the deferment of the installments. (p 367 d)

[5] The defendant had breached the terms of the facilities and the plaintiff was therefore entitled to review it and even recall it as it did in this case. The decision to recall the facilities was purely a commercial decision which the bank was entitled to invoke what more with the defaults by the first defendant in servicing interest and making installments. (p 368 b)

[6] The defendant had failed to show that MK Segaran & Associates Sdn Bhd were not acting as agent or did not have the ostensible authority to act on their behalf. The letter of authorization to reveal information to MK Segaran & Associates Sdn Bhd signified the role of this financial consultant company acting on behalf of the first defendant. The letter spoke for itself unless first defendant could advance reasons that no such authority was given which they had failed to do. This was a clear admission of the indebtedness by the first defendant and again estoppel sets in to prevent the first defendant from disputing the amount due. (pp 368 h & 369 a)

[7] Clause 8 of the corporate guarantee provided that the guarantor would not be released or exonerated, it being spelt out in cl. 3 as a continuing guarantee. The second defendant was bound and liable under the said guarantee. (p 369 b)

[8] It was incumbent on the defendants to show that there were triable issues or question in dispute to merit a trial of this action. The defendants would have to show this either through affidavit evidence or the statement of defence filed therein. The defendants had failed to raise any arguable issue to merit a trial. This was a proper case to grant summary judgment. (p 369 e)

Case(s) referred to:

Abdol Mulok Awang Damit v. Perdana Industri Holdings Bhd [2003] 3 CLJ 497 CA ***(refd)***

American Express Europe Ltd v. Mervyn Leroy Fishback [1993] 1 AMR 25 ***(refd)***

Amsteel Securities (M) Sdn Bhd v. Datuk Hwong You Chuaang [2001] 7 CLJ 1 HC ***(refd)***

BBMB Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76 ***(refd)***

Dato' Mohd Anuar Embong & Anor v. Bank Bumiputra (M) Bhd [1997] 2 CLJ 475 CA ***(refd)***

Malayan Banking Bhd v. Foo See Moi [1981] 2 MLJ 17 ***(refd)***

Malayan Banking Bhd v. Yap Seng Kee [1988] 1 MLJ 313 ***(refd)***

Perwira Habib Bank Malaysia Bhd v. Fast Travel (M) Sdn Bhd [1988] 3 MLJ 211 ***(refd)***

Teh Eok Kee & Anor v. Tan Chiah Hock & Anor [1996] 2 CLJ 227 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 30

Evidence Act 1950, s. 90A

For the plaintiff - Alan Su; M/s Yap Su & Assoc

For the defendant - Hari Singh Sidhu; M/s Concisom & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Said J:

The plaintiff is on business as licensed bank and having its branch office at Grd/Mezz Floor, Wisma Lee Rubber, Jalan Melaka, 50100 Kuala Lumpur. The first defendant is formerly known as Kejuruteraan Superskill Sdn Bhd and having its registered address at Lot 10, Sg Siput Light Industrial Estate, 31100 Sungai Siput (U), Perak. The second defendant is the holding company of the first defendant and having its registered address at Lot 10, Sg. Siput Light Industrial Estate, 31100 Sungai Siput (U).

Upon the request of the first defendant, the plaintiff granted to the first defendant the following credit facilities by letters of offer dated 13 March 1997 and 30 September 1996.

	Type of Facility		Amount
	7-year Term Loan		RM1,300,000.00
	Overdraft		RM 1,500,000.00
	Letters of Credit (sign/term: 150 days)	]	
b	Trust Receipts (150 days)	]	
	Bankers Acceptances (150 days)	]	
	Bills of exchange purchase documentary (Local/foreign bills)/	]]	RM2,500,000.00
c	Export Credit Refinancing (Pre-shipment – 120 days)	]]	
	(Post shipment – 180 days)	]	
	Shipping Guarantee/	]	
d	Letter of Guarantee	]	_____ RM4,300,000.00 ==========

By a corporate guarantee dated 11 April 1997 the second defendant guaranteed the facilities for an aggregate amount of RM4,300,000 inclusive of interest, commission and accrued charges.

e

The plaintiff varied the prescribed rate for term loan above the Kuala Lumpur interbank offer rate for three months fund, overdraft and bankers acceptance over and above the bank's base lending rate from time to time, which currently are as follows:

f

Facility	Current Prescribed Rate
Term Loan	1.50% + Kuala Lumpur interbank offer rate
g Overdraft	1.50% + Base Lending Rate
Trust Receipts	2.50% + Base Lending Rate
Bankers Acceptances	2.50% + Base Lending Rate

h

The plaintiff has forwarded to the first defendant the relevant statement of accounts for the said credit facilities. Copies of statement of accounts for the said credit facilities generated in the course of its ordinary use and made in the usual and ordinary course of business were sent to the first defendant. The duly signed certificate pursuant to s. 90A of the Evidence Act 1950 for the said credit facilities was also exhibited.

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The first defendant defaulted in the repayment of the said term loan facility and were in arrears of RM263,468.98 as at 14 March 2001. The plaintiff through its previous solicitors, Messrs Chan & Associates by notice dated 19 March 2001 demanded the first defendant to pay up the arrears which it failed to do so. By letter dated 21 August 2002 the plaintiff through Messrs Yap Su & Associates addressed to the first defendant recalled the said credit facilities and declared the indebtedness outstanding in respect thereof to be forthwith due and payable. In the same notice, the plaintiff made a demand requiring the first defendant to repay the debt then owing for all the facilities in the sum of RM3,939,318.04 as at 31 May 2002 and interest accruing thereon.

The plaintiff also through Messrs Yap Su & Associates by letter dated 21 August 2002 made a demand against the second defendant as guarantor under the corporate guarantee dated 11 April 1997, for payment of the debt then owing by the first defendant.

The plaintiff was granted summary judgment by the learned senior assistant registrar and hence this appeal by the defendants to me. Parties agreed at the hearing that the determination of this suit will bind the parties in the 22-1430-2002 also before this court. I shall now deal with the issues raised accordingly.

Whether Plaintiff Entitled To Vary The Margin Of Interest For The Facilities And Charge Compound Interest

Clause 2(b) of the letter of offer dated 31 March 1997 reads:

> **Interest:**
>
> *Term Loan*
>
> 1.0% above our base lending rate of 9.25% per annum, subject to our right to vary the base lending rate and/or margin from time to time. Interest shall be calculated on daily basis, monthly rest and serviced monthly prior to full drawdown. From the date of full drawdown, interest shall be calculated on monthly basis, monthly rest and serviced monthly.
>
> *Overdraft, trust receipts and bills of exchange purchase documentary (local bills)*
>
> 1.0% above our base lending rate of 9.25% per annum currently, that is, 10.25% per annum, subject to our right to vary the base lending rate and/or margin from time to time. Interest on the overdraft shall be serviced monthly.
>
> *Bankers acceptances*
>
> 0.5% per annum above the prevailing interbank rate, subject to our right of variation from time to time, calculated in advance on a daily basis in respect of the tenure and principal amount stipulated on the face of the bankers acceptance. Provided always that in default of payment of such stipulated principal amount

on the maturity of the said bankers acceptance, interest thereon shall be chargeable at 1% above the applicable overdraft interest rate calculated from the date of maturity until full satisfaction or any other rate as may be determined by us.

Bills of exchange purchase documentary (foreign bills)

At prevailing exchange rates and other charges (if any) which may be imposed by us as and when applicable.

Export credit refinancing

0.75% above Bank Negara Malaysia's funding rate of 6.70% per annum currently, i.e. 7.45% per annum, subject to variation from time to time.

Clause 2(b) gives the plaintiff the contractual right to vary not only the margin but also the BLR of the facilities. The terms and conditions set out there are contractual and binding on the parties. However, even though the plaintiff has the discretion to vary the rates, that discretion must be subject to reasonableness of the increase based on commercial banking practice, a term which must necessarily be implied into the contract. The defendant's contention that cl. 2(b) is void for uncertainty under s. 30 of the Contract Act is therefore without force. In *Perwira Habib Bank Malaysia Bhd v. Fast Travel (M) Sdn Bhd* [1988] 3 MLJ 211 Siti Norma Yaacob J (as she then was) appropriately answered the question when Her Ladyship said:

> The two rate of interest claimed at 9% and 16.5% pa are the agreed and permissible rates of interest under the letter of offer dated 12 June 1984 as the first defendant had also permitted the plaintiff, at its discretion, to raise the interest from 9% to 16.5% pa under the letter of offer.

The first defendant sought to adduce the existence of a collateral agreement on the increase of interest rate based on representations by plaintiff over cl. 2(b). However no primary facts of the said collateral agreement were averred. It is incumbent on the first defendant to aver the particulars of the representations made. This general averment by the first defendant is insufficient to raise it as an issue to be tried.

On the question whether plaintiff is entitled to charge compound interest plaintiff referred to *Amsteel Securities (M) Sdn Bhd v. Datuk Hwong You Chuaang* [2001] 7 CLJ 1 where the court referred to cl. 7 of the agreement and said:

> By the said cl. 7, the customer has agreed to pay the plaintiff 'interest at rate which is equivalent to 2% above your cost of fund on any amount due and owing to you (prescribed rate) on my/our account ...

Even though cl. 7 do not have express provision on "compound interest", His Lordship Low Hop Bing J held that cl. 7 allowed plaintiff to charge compound interest when he went on to say:

> Upon proper construction of express provision of cl. 7, it is my finding that so long as there is a sum of money due and payable by the customer to the plaintiff, interest at the prescribed rate would be charged on the customer's account and this process of charging interest on all sums due and payable would continue until settlement. In other words, cl. 7 to which both the customer and plaintiff have expressly agreed obliges the customer to pay all interest including interest upon interest. **Therefore, pursuant to the Supreme Court Judgment in *Yeng Hing* case, the plaintiff is entitled to recover all the compound interest accrued ...** (emphasis added).

Plaintiff's counsel also referred to *Malayan Banking Bhd v. Foo See Moi* [1981] 2 MLJ 17 where Chang Min Tat FJ at p. 20 observed:

> In *Yourell v. Hibernian Bank,* Lord Atkinson described the practice of bankers in debiting interest to an overdrawn current account periodically and thereby increasing the capital sum, which is the effect of the provision for periodical "rest", as "a usual and perfectly legitimate mode of dealing between banker and customer", though it meant securing for the bank the benefit of compound interest. *Paget on Banking* (8th Edition) at page 133 justifies it thus: ... Where the customer has acquiesced in the system under which interest is charged, it also would justify the claim. Such acquiescence will justify the charging compound interest or interest with periodical rests.

Clause (e) of the letter of offer allowed the plaintiff to charge 1% above the applicable interest rate or such other rates as may be determined by them on overdue amount. As long as any sum is due and not paid including interest by the specified date, interest at the prescribed overdue rate is payable and this includes interest upon interest. The plaintiff is therefore entitled to charge this interest upon interest or compound interest.

Whether Failure Of Defendant To Dispute The Amount Due Before Filing Of Suit Amounts To An Estoppel And The Effect Of The Certificate Of Indebtedness

At all material times first defendant did not make any complaint over the statement of accounts and the letter of demand. Plaintiff's counsel contended that the first defendant is estopped from raising the issue. He referred to the case of *American Express Europe Limited v. Mervyn Leroy Fishback* [1993] 1 AMR 25, 1031. The defendant had never raised any objection to the monthly statement. He had been making payments towards the amount due. The non query of the accounts creates an estoppel against first defendant. A bare assertion by the defendant is insufficient. (See *Abdol Mulok Awang Damit v. Perdana Industri Holdings Bhd* [2003] 3 CLJ 497).

Plaintiff had expressly denied the calculation made by first defendant in LKFI first defendant failed to show that the person making the calculation had special knowledge or skilled in further arithmetic for it to be relied upon on the calculation, variation and formula used for interest in view of the various facilities and differing rates of interest, commission, commitment fees and overdue charges granted to the first defendant. Further it is an afterthought since there is inordinate delay of three years and nine months after the statement of account had been rendered to the first defendant before first defendant prepared and averred miscalculation in the amount due.

At all material times first defendant had not made any complaint over the calculation and continued to pay the sum. I must agree that this self serving statement does not help the first defendant as it is late in the day for them to raise it. Anyway it is not of substance for this court's consideration. On a close scrutiny of the relevant statements on the overcharging of interest for the period 1 August 1997 to 31 August 1997, the predetermined interest *vide* HSBC letter dated 14 August 1997 was calculated based on amount due by first defendant at 30 August 1997. The letter also sought the payment on 30 August 1997. However the first defendant made the payment for this interest two days earlier ie, on 28 August 1997. From the statement, upon the said payment being made on 28 August 1997, the outstanding sum was reduced from RM1,242,085.51 to RM1,231,009.69. The interest calculated until 31 August 1997 was also thereby reduced to RM11,064.33. It is therefore incorrect to say the first defendant was overcharged. In fact with the early payment of the interest two days earlier than its due date, the interest due until 31 August 1997 was reduced from RM11,075.82 to RM11,064.33 and this is inclusive of another day's interest on 31 August 1997. I find there is no merit in this argument of miscalculation.

Referring to the computation of interest period 1 November 1997 to 30 November 1997, first defendant contended there was a miscalculation and overcharging of RM467.90. According to first defendant's calculation it should be RM10,770.32 whereas plaintiff debited RM11,238.22. I observed the calculation by the first defendant was based on an interest rate of 10.55% instead of the prevailing rate of 10.65%. No explanation by first defendant why an interest rate of 10.55% was used.

At first blush it may appear to be irreconcilable but on scrutiny the charges appears to be correct based on the prevailing rates that the plaintiff could legitimately charge. I am not in doubt that the calculations were correct as the right denominator used. I am satisfied that the first defendant has not successfully raised "manifest error" to the certificate of indebtedness over calculation of interest by exh. LKFI in encl. 15.

Whether Plaintiff Had Breached Its Promise To Grant The Deferment Of 18 Months Installments

Defendants contended that by LCH4 plaintiff had agreed at the request of the defendant *vide* letter dated 7 October 1998 to grant an 18 months deferment of installments for term loan effective from 1 November 1998.

The plaintiff instead averred that condition 2 and 5 therein were not complied by defendants.

> Condition (2) settlement of current 2 months arrears.
>
> Condition (5) If the above terms and conditions are acceptable, kindly confirm by signing and returning the duplicate of this letter by 31.10.98 after which date this offer is deemed to have lapsed. Any extension of the availability period of this offer is at our sole discretion.

The letter was signed by defendant on 2 February 1999 while the payment of arrears was made on 27 January 1999. Therefore evidently it is up to the plaintiff to accept which they chose not to. There was no need to notify defendant that it was rejected because the offer had lapsed by then. It was the first defendant that did not comply with the explicit terms of condition 2 and 5 of the letter of offer and therefore not entitled to the deferment of the installments.

Whether Plaintiff Entitled To Review And Recall Facilities

Plaintiff referred to cl. (1) of the offer letter dated 13 March 1997.

> 2(1) Review: The facilities shall be reviewed annually or at such times as may be decided by us, and may be recalled at our discretion.

These facilities were repayable on demand. Defendant contended that plaintiff had breached the contract by terminating the facilities and cited the case of *BBMB Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76 and attempted to distinguish the cases referred by the plaintiff. The defendant conceded the recall of the facilities was due to the financial crisis. The plaintiff had expressly retained the right to review the facilities at any time and the discretion to recall the facilities. Unlike in *Mae Perkayuan*'s case, the facilities here is not for fixed term. Mae Perkayuan had been distinguished by the Court of Appeal in *Dato' Mohd Anuar Embong & Anor v. Bank Bumiputra (M) Bhd* [1997] 2 CLJ 475 where the Court of Appeal said:

> We do not for one moment doubt the soundness of that ruling but the facts of *Mae Perkayuan*'s case are distinguishable in that only one agreement was involved between the parties namely the arrangement for the granting of secured overdraft facilities for a fixed period of four years. By recalling the facilities mid-term when the agreement had still about 8 1/2 months to run, the natural and probable result of such a breach is the loss of profits suffered by *Mae Perkayuan*.

Defendant had breached the terms for the facilities and the plaintiff is therefore entitled to review it and even recall it as it did in this case. The decision to recall the facilities is purely a commercial decision which the bank is entitled to invoke what more with the defaults by the first defendant in servicing interest and making the installments.

Whether Plaintiff Entitled To Rely On The Admission Of Debt

Defendant contended that the letter dated 29 May 2003 by M.K. Segaran & Associates Sdn Bhd is not an unqualified admission. The letter is not marked as 'without prejudice.' He went on to suggest that the letter was an attempt by M.K. Segaran & Associates Sdn Bhd who represented P.T. Growth Sumatra Industry Ltd from Indonesia who were supposed to provide the financing. The said M.K. Segaran & Associates Sdn Bhd did not act as agent of first defendant. Instead defendant said plaintiff had failed to show proof that the said M.K. Segaran & Associates Sdn Bhd had the authority to do so for first defendant. It is interesting to note that this letter was issued way after the first and second defendant had filed their defence to the suit.

Whether the said company acted as agent for first defendant must be seen from content of the letter. The letter in its 2nd para states "we herewith wish to propose on behalf of Belton Springs" with a copy to first defendant for the attention of its Executive Director Leong Kim Foo. First defendant never protested when it received the letter. In any event the burden is on the first defendant to show that the said company did not act as its agent in the letter. In *Teh Eok Kee & Anor v. Tan Chiah Hock & Anor* [1996] 2 CLJ 227 Edgar Joseph J FCJ, said of admission by agent:

> It is clear law, that not only admissions made personally by the party, but also admissions by those in privity with the party are admissible, as exceptions to the hearsay rule. The most important examples of those in privity are predecessors in title, referees, servants or agents acting within the scope of their authority (See s. 18(1) of the Evidence Act 1950).

I am satisfied first defendant had failed to show that M.K. Segaran & Associates Sdn Bhd were were not acting as agent or did not have the ostensible authority to act on their behalf. The Letter of Authorization to reveal information to M.K. Segaran & Associates Sdn Bhd signifies the role of this

financial consultant company acting on behalf of the first defendant. The letter speaks for itself unless first defendant could advance reasons that no such authority was given which they failed. This is a clear admission of the indebtedness by the first defendant and again estoppel sets in to prevent first defendant from disputing the amount due.

Liability Of Second Defendant Under The Guarantee

The corporate guarantee was given by second defendant in consideration of the facilities extended to the first defendant. Clause 8 of the corporate guarantee provided that the guarantor will not be released or exonerated, it being clearly spelt out in cl. 3 as a continuing guarantee. I hold that the second defendant is bound and liable under the said guarantee. In *Malayan Banking Berhad v. Yap Seng Kee* [1988] 1 MLJ 313 Mohamed Yusof J said:

> These provisions are in my view sufficient for the plaintiff to vary the securities which had been agreed by the Defendants or to grant whatever indulgence to the companies without obtaining prior consent of the Defendants. These clauses of the guarantees although contrary to section 86 of the Contracts Act are valid – see *Ooi Boon Leong v. Citibank* [1981] 1 MLJ 333 and therefore binding on the guarantor.

It is incumbent on the defendants to show that there are triable issues or question in dispute to merit a trial of this action. The defendants will have to show this either through affidavit evidence or the statement of defence filed therein. The defendants had failed to raise any arguable issue to merit a trial.

In conclusion having satisfied that the defendants had failed to raise any issue this is a proper case to grant summary judgment. Based on the foregoings I dismissed their appeal with costs.